ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	
Interstate Common Carriers	)	CC Docket No. 92-13
	)	

REPLY COMMENTS

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Table of Contents

SUMMARY

The comments filed in this proceeding overwhelmingly support the Commission's continued application of its "forbearance rule," which was first implemented nearly a decade ago. Only five of over thirty participants in this proceeding -- all of which are carriers subject to being regulated as "dominant" -- object to the rule, which has so significantly enhanced competition in the interstate interexchange market.

Those who would return Commission regulation to an era in which competition was struggling to first become established -- and re-impose regulation that, in fact, inhibits it -- clearly are acting contrary to the public interest. This is the position advanced primarily by the American Telephone and Telegraph Company, which is completely opposite the one it articulated a scant six years ago when it argued that forbearance by the Commission in enforcing the tariff-filing requirement was not foreclosed by MCI v. FCC.

Carriers who provide some of their services under tariff and others by contract do not violate the "filed rate doctrine" so long as the tariffed services they furnish are provided in accordance with their filed and effective tariffs. Accordingly, Maislin, by its very facts (as well as other compelling reasons), does not undermine the Commission's forbearance rule.

The Commission's authority to implement forbearance plainly exists under the Communications Act and, in any event, such approach to regulation has been ratified by the Congress. If there was any doubt as to Congressional acquiescence in this approach to regulation, it was dispelled with the enactment by Congress of the Telephone Operator Service Consumer Protection Act in 1989. Therein, the Congress directed the Commission to require that operator service providers, the applicability of the forbearance rule to them notwithstanding, file and maintain "informational tariffs" with the Commission for at least a four-year period.

Finally, the Commission's long-standing "dual approach" to regulating dominant and non-dominant carriers does not raise Constitutional due process or equal protection issues, nor is this particular proceeding well suited to deciding whether local exchange carriers should be accorded non-dominant carrier regulatory status. This proceeding was undertaken to address and resolve whether the Commission has the authority to engage in forbearance regulation -- not which carriers are eligible for it.

The record in this proceeding demonstrates that the Commission clearly possesses the authority to continue with its forbearance rule for application to carriers lacking in market power and that it should do so in the public interest.

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REPLY COMMENTS

MCI Telecommunications Corporation (MCI), pursuant to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding,[1/] hereby furnishes its reply comments responsive to comments addressing the Commission's more than decade-old "forbearance rule" practiced in connection with its regulation of non-dominant common carriers.[2/]

[1/] FCC 92-35, rel. January 28, 1992.

[2/] See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 F.C.C. 2d 308 (1979); First Report and Order, 85 F.C.C. 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445 (1981); Second Report and Order, 91 F.C.C. 2d 59 (1982), recon., 93 F.C.C. 2d 54 (1983); Second Further Notice of Proposed Rulemaking, F.C.C. 82-187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983; 48 Fed. Reg. 46,791 (October 15, 1983); Fourth Report and Order, 95 F.C.C. 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, F.C.C. 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 F.C.C. 2d 1191 (1984); Sixth Report and Order, 99 F.C.C. 2d 1020 (1985), rev'd, MCI Telecommunications Corporation v. Federal Communications Commission, 765 F.2d 1186 (D.C. Cir. 1985), (hereinafter, MCI v. FCC). (Hereinafter, collectively, "Competitive Carriers")

Introduction And Summary

In Its NPRM, the Commission has undertaken to re-examine whether "permissive tariffing" allowed carriers classified as "non-dominant" because they lack market power, or the ability to act in an anti-competitive manner, is "lawful."

In its initial comments, MCI demonstrated that the Commission possesses the authority under the Communications Act of 1934, as amended, to continue to permit non-dominant carriers, such as MCI, not to file tariffs, if that practice furthers the public interest in developing a more effectively competitive interstate interexchange market. Also, MCI showed that, if the Commission's forbearance rule is found to be unlawful, then all carriers should be required to file tariffs in connection with the services they furnish end-users, albeit only for offerings extended after determination of the unlawfulness of the forbearance rule.

Further, MCI indicated that, if all non-dominant carriers were required to file and maintain tariffs, competition in the interexchange marketplace would be adversely impacted because of the resulting publication of prices and the incurring of costs associated with the filing and maintaining of tariffs at the Commission. Finally, MCI submitted that any "re-regulation" of non-dominant carriers, which effectively would follow the demise of the forbearance rule, would need to result in the reimposition

of more stringent regulation on AT&T because it alone remains "dominant" -- and thus distinguishable from other interexchange carriers -- under the Commission's current regulatory regime. It would be arbitrary and capricious in the extreme if the Commission were to impose an identical regulatory structure on non-dominant and dominant carriers alike, given the fact that market power continues to reside only in the latter.[3/]

The great weight of the filings made in this proceeding supports MCI positions on the questions set forth by the Commission in the NPRM. Thus, on the critical question of whether the Commission has the authority to continue with its forbearance rule, only five among thirty-four parties filing comments, according to MCI's calculation, argue that it does not, and all of them are classified as dominant under Competitive Carriers.[4/] At bottom, the goal of opponents of the forbearance rule is either to achieve their own forbearance status or, alternatively, to cause non-dominant carriers to be re-regulated by the Commission. They thus seek "parity" in regulation, even if market conditions don't warrant such treatment at this time.

[3/] This was most recently confirmed with respect to the American Telephone and Telegraph Company (AT&T) in Interexchange Competition. Memorandum Opinion and Order on Reconsideration, In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, FCC 92-181, rel. April 17, 1992.

[4/] These are AT&T, Alascom, Inc., U S West Communications, Inc., NYNEX Telephone Companies, and Mobile Marine Radio, Inc.

No useful purpose would be served by undertaking to "pad" the record through repetition of the arguments of those supporting MCI positions. Accordingly, MCI will limit this reply to contrary and erroneous positions expressed by some in their initial comments. This approach should serve well to assist the Commission in focusing its efforts on those issues which need to be addressed in its decision.

I. AT&T's Position Today is Completely Inconsistent With Its Position a Scant Six Years Ago

AT&T contends that the ultimate issue in this proceeding presents "pure questions of law that have already been decided by the Supreme Court and Court of Appeals.[5/] AT&T then asserts that "[e]ach has held that statutory tariff filing requirements are mandatory for all common carriers, and that regulatory agencies have no discretion to adopt policies or rules that order, sanction or excuse violations of them."[6/]

MCI v. FCC and Maislin represent the cornerstone of AT&T's challenge to Commission policies that have so substantially contributed to the growth of competition in interexchange telecommunications over the past decade. Yet, barely six years ago, AT&T argued that the forbearance rule, at least for "pure" resellers, "is within the agency's power under the Communications

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[5/] AT&T Comments at 1-2, citing Maislin Industries, U.S.. Inc., v. Primary Steel, Inc., 110 S. Ct. 2759 (1990) (Maislin), and MCI v. FCC.

[6/] Id at 2.

Act,"[7] and it asserted that "[t]he Communications Act does not expressly require the Commission to rely on the filing of tariffs to regulate pure resellers or to take enforcement action against any pure reseller that does not file tariffs."[8] Significantly, this broad and uncompromising support for Commission policies that AT&T so fiercely attacks now was entered after -- and not before -- the court's 1985 disposition of MCI v. FCC, which AT&T relies upon to support its changed position.[9]

Perhaps most important, AT&T agreed (as do the vast majority of participants in this proceeding) that "the essential holding of [MCI v. FCC] was only that the Commission could not prevent carriers from filing tariffs...."[10] Accordingly, AT&T's reliance here on MCI v. FCC ignores the Court's express reservation that it was not reaching "the question whether the

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[7] Brief for Intervenor at 18, MCI Telecommunications Corporation v. Federal Communications Commission, Case No. 84-1402, vacated, D.C. Cir, September 5, 1986; See, also, Order, FCC 87-118, rel. May 1, 1987.

[8] Id. AT&T even argued that the Commission's reliance upon "market forces and various statutory provisions, including the statutory complaint process, rather than enforcement of any tariff filing requirement, is not an abdication of its statutory obligation, but is within its broad discretion [sic] how to effectuate its statutory obligations." (Id at 19, emphasis in original)

[9] That case, according to AT&T then, was not contrary to exercise by the Commission of its discretionary authority to select the means by which "to secure compliance with the Congressional requirement that rates be just, reasonable and nondiscriminatory." See AT&T Intervenor's Brief at 40-41.

[10] Id at 41.

FCC's earlier permissive orders are invalid."[11/] Under the circumstances, AT&T's purported reliance now on MCI v. FCC to support its position is undermined completely by its position in 1986 on the same question which, of course, changed when AT&T's 1989 "understandings and expectations" concerning its own deregulation never materialized, thereby incensing it to lash out against MCI and the Commission.[12/]

II. The "Filed Rate Doctrine" Is Not Violated When Some Of A Carrier's Services Are Furnished Under Tariff And Others Are Provided Under Contract

US West is wrong when it argues that, in light of Maislin, customers who purchase off-tariff service arrangements from non-dominant carriers with tariffs on file with the Commission cannot rely on those arrangements but must pay the filed rates. US West Comments at 7-8. There are no legal or logical bases to contend that non-dominant carriers may not lawfully provide some services on a non-tariff basis and others on a tariff basis. Sprint Communications Company, L.P. (Comments at 6-7) also seems to be confused on this point, as it appears to contend that

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[11/] 765 F.2d 1196.

[12/] MCI recognizes that its position on the question of required tariffing also has shifted from the one it espoused during Commission and judicial proceedings conducted in the mid-1980's. The important difference is that MCI's position changed to conform to the Commission's view, once MCI's arguments were rejected, whereas AT&T's position changed in defiance of the Commission. Moreover, it is AT&T's position today -- not MCI's -- that would have a plainly deleterious effect on the further development of competition in the interstate interexchange market.

carriers must either provide all or none of their common carrier offerings under tariff in order to avoid violating the "filed rate doctrine."[13/]

MCI's position on this issue has been set forth in several past Commission proceedings in which it has indicated that it offers its standard services pursuant to tariff and its non-standard offerings pursuant to contract. The latter contain unique terms based upon term and volume commitments (with attendant "shortfall" penalties) made by any customers willing to commit to and satisfy the additional requirements. This does not place MCI in violation of the "filed rate doctrine" because the service terms available to takers of its standard offerings do not vary from those contained in MCI's effective tariffs, and there are no tariffed counterparts for its untariffed, contract service offerings. Since no customer is placed in a position of paying prices for a service for which other customers pay a different, tariffed rate, the practice does not lead to the kind

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13/ Sprint offers no compelling support for such a position, nor can it. It may well be that Sprint is only addressing the case of a carrier providing certain services on both a tariff and non-tariff basis, rather than the case of a carrier providing certain services on a non-tariff basis and other services on a tariff basis. If that is the case, then the thrust of its argument is not inconsistent with MCI's position that there can be no violation of the filed rate doctrine if there is no filed rate for the non-tariffed service in question. See, also, Comments of GTE Service Corporation at 19-23 ("Under Maislin and the filed rate doctrine, a common carrier cannot provide service to some customers pursuant to rates contained in filed tariffs and offer the same service to other customers at rates that differ from those in their filed tariffs.")

of discrimination that the statute forbids. Accordingly, contrary to US West's insinuations, customers who purchase non-tariffed contract services from MCI (or any other non-dominant carrier similarly operating) do not do so "at risk," but can fully rely on the enforceability of these arrangements.

III. The Forbearance Rule Is Authorized By the Communications Act And, In Any Event, Has Been Ratified By The Congress

US West and AT&T erroneously contend that the "plain language" of Section 203(a) requires non-dominant carriers to file tariffs and it is, therefore, unnecessary to consider more. US West Comments at 4-7; AT&T Comments at 3-4. The short answer is that, although "the starting point in every case involving the construction of a statute is the language itself," that "need not end the inquiry." Watt v. Alaska, 451 U.S. 259, 265-66 (1981) (citations omitted).

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Id. at 266 n.9 (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd 326 U.S. 404 (1945)). The Communications Act is just such a statute.

As the Court has pointedly observed, "[T]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 625 n.7 (quoting U.S. v. Monia, 317 U.S. 424, 431 (1943)). There is inevitably a need for legislative guidance. For this reason, "despite ritualistic incantations of the 'plain meaning rule,' 'no occasion for statutory construction now exists when the Supreme Court will not look at the legislative history.'" Planned Parenthood Federation of America v. Heckler, 712 F.2d 650, 657 n. 32 (D.C. Cir. 1983) (emphasis in original) (citations omitted).

As MCI has conclusively demonstrated, the Congress has fully understood the significance of the Commission's forbearance rule from its inception, and it has acquiesced in and ratified the Commission's interpretation of its authority under the Communications Act to remove the tariff-filing "requirement" established in Section 203 of the Act.[14/] In any event, even applying a "plain language" analysis, the arguments of US West and AT&T are meritless.[15/] Section 203(b)(2), which must be read

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[14/] See MCI Comments at 23-45.

[15/] Notably, the Chevron and Hallstrom decisions cited by US West and AT&T do not support their contentions that the Commission may not consider Congress' intent in considering the lawfulness of the forbearance rule. In both cases, the Court did not limit its review to the plain meaning of the statute but considered legislative history. See Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837, 843-862 (1984); Hallstrom v. Tillamook County, 110 S.Ct. 304, 310 (1989).

in conjunction with Section 203(a), explicitly authorizes the Commission to "modify," without limitation, the tariff filing requirements of Section 203(a), which the Commission has done in promulgating the forbearance rule.[16/]

Moreover, statutes must be read in their entirety so that each section is given meaning and effect and no section is rendered superfluous, inoperative or meaningless.[17/] Given the "plain meaning" of Section 26(h) -- as re-imposing tariffing requirements for one category of non-dominant carriers -- Section 203 can only be construed to permit forbearance for all other non-dominant carriers. This doctrine of construction thus conforms MCI's and the Commission's position on the proper interpretation of Section 203, independently of the issue of Congressional ratification.

[16/] See MCI Comments at 5-7.

[17/] See Mountain States Tel. & Tel. Co. v. Santa Ana, 472 U.S. 237, 239 (1985) ("[It is]...'the elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative'"); Payne v. Panama Canal Co., 607 F.2d 155, 164 (5th Cir. 1979) (Every statute must be viewed in its entirety so that each part has a sensible and intelligent effect harmonious with the whole. It is not to be presumed that Congress intended any part of a statute to be without reasonable meaning"); and Norfolk & Western Ry. Co. v. United States, 768 F.2d 373, 379 (D.C. Cir. 1985), cert denied sub nom. Aluminum Ass'n., Inc., v. Norfolk & Western Ry. Co., 479 U.S. 882 (1986) ("...it is generally desirable in construing statutes to give effect '"if possible to every word, clause and sentence of [the] statute" so that no part will be inoperative, superfluous, void or insignificant.'" (citations omitted))

IV. The TOCSIA Clearly Discloses Congressional Acceptance And Acquiescence In The Forbearance Rule

If there was any doubt as to the acquiescence of the U.S. Congress in the Commission's forbearance rule, that doubt evaporated with the enactment of the Telephone Operator Service Consumer Protection Act of 1989 (TOCSIA). In its Comments, MCI extensively reviewed Congress' knowledge of the Commission's interpretation of Section 203 and demonstrated that the TOCSIA legislation provides perhaps the clearest evidence that Congress has ratified the Commission's interpretation of its authority to implement forbearance. MCI Comments at 34-35. Numerous others agree with MCI's view of the significance of that legislation. See, e.g., MFS Comments at 8-11; CTIA Comments at 14 -17; Comptel Comments at 9 -11.

In TOCSIA, Congress imposed a special tariff filing obligation on operator service providers by adding Section 226(h) to the Communications Act. This provision directs operator service providers to file "informational tariffs" and authorizes the Commission, four years from October 17, 1990, to waive that tariff-filing requirement altogether. 47 U.S.C. § 226(h). In addition, Congress enacted Section 226(i), which provides that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter." 47 U.S.C. § 226(i).

Congress unquestionably recognized that operator service providers were non-dominant carriers under the Commission's regulatory regime and were, therefore, subject to the forbearance rule when it enacted Section 226(h). This provision would have been superfluous if the Commission, in Congress' eyes, was required to cause operator service providers to file tariffs under Section 203 of the Act. In enacting TOCSIA, however, Congress knew the Commission was applying its forbearance rule to alternative operator service or AOS providers and elected to modify that Commission approach through new legislation. The Report of the House Committee on Energy and Commerce on H.R. 971, the Telephone Operator Service Consumer Protection Act of 1989, explicitly states that "[s]ince the FCC classifies these AOS providers as 'non-dominant' or carriers with[out] market power, the Commission currently does not regulate their rates." H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989).

Congress' decision to create a legislative exception to the Commission's forbearance rule by requiring operator service providers to file abbreviated, interim tariffs is confirmed by Section 226(i), which leaves undisturbed the obligations of other carriers. In the case of non-dominant carriers, these include the obligations to charge just and not unlawfully discriminatory rates in compliance with Sections 201(b) and 202(a) of the Act but, under the forbearance rule, not the duty to file tariffs. Accordingly, Congress' full knowledge of the Commission's

practices can only be construed as concurrence by the Congress in the Commission's interpretation of its authority under Section 203 of the Act to forbear from requiring that all carriers file and maintain tariffs under Section 203 of the Act.

V. The Commission's Dual Approach To Carrier Regulation Does Not Raise Constitutional Issues

Southwestern Bell Corporation (SBC) acknowledges that the Communications Act authorizes the Commission to "engage in forbearance or streamlined regulation." SBC Comments at 2. However, it claims that it is entitled to the same treatment accorded non-dominant carriers under Constitutional due process and equal protection principles. SBC contends that "if the Commission decides to relax or eliminates tariff filing requirements for a particular group of service providers, its rule or order in that regard must apply equally to all providers of those services." Id. at 4-5.

SBC misunderstands the basic principles underlying the equal protection doctrine. It mistakenly asserts: "Equal protection is denied when persons engaged in the same business are subjected to different restrictions or are held to [sic] different privileges." SBC Comments at 4 (citing Soon Hing v. Crowley, 113 U.S. 703, 5 S. Ct. 730 (1885)). SBC is closer to the mark in conceding that "the Commission has authority to forebear [sic] and/or to streamline tariff regulation . . . if such actions are

fairly and evenly applied to persons and carriers engaged in similar circumstances." Id. (emphasis added).

Soon Hing v. Crowley [18] and all the other cases cited by SBC establish that the equal protection guarantee is not violated so long as there is no invidious discrimination between classes of persons; that is, if there is a rational basis for treating one class of persons differently from another class, then the two classes are not in similar circumstances, and the equal protection requirement has not been violated. If different regulations are applied to different branches of the same business because certain risks are inherent in one branch but not the other, then there is no violation of equal protection.

The forbearance rule does not create or result in any invidious discrimination. The Commission has not denied dominant carriers equal protection in establishing its regulatory regime on the ground that the risk of non-dominant carriers violating the Communications Act is so minimal that it is not necessary to require them to file tariffs, but that the risk in the case of

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[18] In Soon Hing, the Court upheld an ordinance prohibiting public laundries requiring the use of heating equipment from operating during certain hours but allowing other businesses to operate during the same hours, in order to prevent the possibility of fires. The Court explained that "[t]he specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind." 5 S.Ct. at 733.

dominant carriers is sufficiently substantial that they must be subjected to the full panoply of Title II requirements.[19/]

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), also does not support SBC's position. This case simply stands for the proposition that the only discrimination prohibited by equal protection principles is that which distinguishes between persons in similar circumstances or, in other words, that for which no valid distinction exists.[20/] Similarly unavailing is SBC's reliance on Mathews v. de Castro, 429 U.S. 181 (1976), where the Court sustained provisions in the Social Security Act providing benefits for married, but not divorced, women. The Court found that Congress had a rational basis for distinguishing between the two classes of women based on differences in the problems they faced. Id. at 189.[21/]

[19/] Neither SBC nor any other dominant carrier for that matter can deny that there has been substantial deregulation introduced on their behalf and for their benefit in the recent past. In this regard, AT&T's claim in its Comments (at 9) that "the Commission continues to apply extensive cost support and notice requirements" upon its non-streamlined offerings is laughable. Minimal "price cap" information and fourteen-day tariff filings hardly can be characterized as "extensive."

[20/] In Yick Wo, the Court found a violation of equal protection because an ordinance, although neutral on its face, was applied differently to Chinese-owned laundries, than to Caucasian-owned laundries even though there was no other difference between the two types of laundries. Dominant and non-dominant carriers are not, however, in similar circumstances, given the absence of market power in the latter.

[21/] Garrett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975), also provides no support for SBC. That case merely states that the Commission "cannot act arbitrarily nor can it treat similar

(continued...)

The Commission similarly has a rational basis for distinguishing between non-dominant and dominant carriers in view of the latters' market power and their resulting incentive and ability to violate the Communications Act. The two classes of carriers thus do not present "similar circumstances." The Commission's differing regulatory treatment is reasonably related to the purpose of its statutory responsibilities and is, therefore, valid.[22/] Accordingly, the forbearance rule does not violate equal protection guarantees.

[21/](...continued)
situations in dissimilar ways...." The forbearance rule is scarcely arbitrary but is rationally related to the diverse circumstances presented by dominant and non-dominant carriers, and it fully takes into account the Commission's regulatory responsibilities.

[22/]See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955)("Evils in the same field may be of different dimensions and proportions, requiring different remedies . . . . The prohibition of the Equal Protection Clause goes no further than invidious discrimination"); Royster Guano v. Virginia, 253 U.S. 412, 415 (1920)("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."); Plyler v. Doe, 457 U.S. 202, 216 (1982) (" 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' [citing Tigner v. Texas, 310 U.S. 141, 147 (1940).] . . . . " The classification at issue must bear "some fair relationship to a legitimate public purpose."); City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.")

VI. This Proceeding Is An Inappropriate Vehicle For Conferring Non-Dominant Carrier Regulatory Status on Local Exchange Carriers

NYNEX and Pacific both argue that the Commission's forbearance rule should be extended to some of their services. See NYNEX Comments at 13-20 and Pacific Comments at 3-5. However, the regulatory status of exchange access service providers is not even remotely an issue before the Commission in this proceeding, nor should it be made one by expanding the scope of the inquiry[23/]. Nevertheless, their arguments are analyzed and refuted below.

Non-dominant carrier status, and the streamlining and forbearance associated with it, was granted to interexchange carriers lacking market power in connection with any of the services they offer. Local Exchange Carriers or LECs differ in two critical respects: First, they are dominant in all the interstate access markets in which they participate; and second, even if it were assumed that some LEC services face significant competition, their dominance in related markets provides them with market power in the markets subject to competition.

[23/] The entire history of Competitive Carriers involved a gradual extension of deregulation to additional classes of carriers. Accordingly, within the context of Docket 79-252, NYNEX, Pacific or any other carrier currently regulated as dominant is free to petition the Commission at any time to have non-dominant carrier status extended to them.

Cross-subsidy, cost misallocation and discrimination are all tools that could be used by LECs to compete unfairly in competitive markets. Thus, continuation of regulatory oversight would be required in both monopoly markets and markets subject to some competition. Indeed, the mixture of monopoly and competition requires additional regulatory oversight and scrutiny.

Pacific correctly notes that, despite its status as a dominant carrier, AT&T has been given streamlined treatment for some of its services as a result of price caps and recent decisions in Interexchange Competition. See Pacific Comments at 6. However, although it remains dominant, AT&T no longer has "bottleneck" monopoly power over any essential input. Therefore, AT&T does not have the same incentive and ability to engage in cross-subsidy and discrimination that LECs have.[24/] As MCI has argued elsewhere, "market rules" requiring general availability, resale and unbundling should be sufficient in most cases to reduce the threat of anti-competitive behavior by AT&T. This is not true, however, of LECs whose control over essential inputs provides them with the incentive and ability to discriminate and cross-subsidize.

[24/] The residual advantages enjoyed by AT&T in services such as 800 and operator/card are the result of AT&T's historical monopoly position, but can not be characterized as the result of a bottleneck.

NYNEX argues that emerging competition in some of its markets justifies forbearance regulation for affected services. The argument is incorrect on two counts. First, it is not true that the mere presence of competitive access providers or CAPs makes a market "competitive." Even if pending proposals to enhance the interconnections available to CAPs were approved,[25/] CAPs still would be able to address only a limited portion of the interstate access market. Moreover, the proposal to allow interconnections for purposes of transporting switched access traffic is only at the "inquiry" stage and, even with such interconnection, CAPs would still have access to only a portion of the access market. Indeed, proposals to shift cost recovery from rate elements that interexchange carriers can avoid by using CAP-supplied transport to an "interconnect charge" assessed on all switched access traffic clearly serves to demonstrate the LECs' retention and attempted exploitation of their bottleneck monopoly power.

Second, even if it were true that competition from CAPs is significant, which it is not, there would still be no justification for relaxed regulation of competing LEC services. The LECs continue to possess the incentive and ability to injure the CAPs competitively and to reduce the ability for effective competition to emerge in the market niches that CAPs serve.

[25/] Notice of Proposed Rulemaking and Notice of Inquiry, In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, rel. June 6, 1991.

Indeed, the lessons of experience at the interstate level show that, in response to nascent competition, regulation needs to be increased, not reduced. Formal cost-of-service regulation for AT&T was non-existent when AT&T was a monopoly. Only after competition was first introduced in 1959 and AT&T responded with TELPAK was such regulation of AT&T implemented.

Pacific argues that the CAPS "use" regulation to prevent or delay competition. For example, it contends that "MFS uses the regulatory process to try to decrease the rates for services it purchases and increase the rates for services which are competitive." (Pacific Comments at 8)[26/] However, Pacific ignores the fact that it has the clear incentive and, if unchecked by regulation, would have an ability to reduce prices for competitive services and increase prices for services that MFS much purchase from it, without regard to the relationship of these price changes to underlying service costs.

Finally, it needs to be emphasized that competitors can be successful in preventing rate reductions only if the Commission is persuaded that dominant carrier tariff proposals either violate the Act or likely will be found to violate the Act after

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[26/] AT&T likewise has long contended that its competitors abuse the regulatory process in order to try to gain the upper hand in the developing competitive marketplace. In doing so, however, it has refused to recognize that legitimate questions of lawfulness frequently were raised concerning its offerings, several of which ultimately were either rejected or suspended and set for investigation by the Commission.

an investigation. As cost-based tariffs in all likelihood will be approved, the LECs have only themselves to blame if their new service or reduced price proposals are delayed or derailed because they are unsupported or unlawful.

In sum, LEC requests for forbearance or streamlined regulation in this proceeding are misplaced and, in any event, are based on faulty reasoning. This proceeding was undertaken to address and resolve whether the Commission has the authority to engage in forbearance regulation -- not which carriers may be eligible for such regulation.

Conclusion

For all the reasons set forth herein, the Commission should find and conclude that it possesses the authority to continue with its forbearance rule for application to common carriers lacking in market power.

Respectfully submitted,

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